

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 14 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSEPHINE ESPINOZA,

Defendant - Appellant.

No. 05-30577

D.C. No. CR-03-00026-1-RFC

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Richard F. Cebull, District Judge, Presiding

Submitted September 12, 2006**
Portland, Oregon

Before: HAWKINS, SILVERMAN, and GOULD, Circuit Judges.

Josephine Espinoza appeals the district court's denial of her motion to compel specific performance of her plea agreement. We have jurisdiction pursuant to 18 U.S.C. § 3742 and affirm.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

The government argues that Espinoza waived her right to appeal. However, the “post-conviction proceeding” waiver language in the plea agreement is too ambiguous to encompass this appeal. *See United States v. Speelman*, 431 F.3d 1226, 1230-31 (9th Cir. 2005).

The government did not breach the plea agreement. The unambiguous plea agreement did not require that the government file a substantial assistance motion. *United States v. Schuman*, 127 F.3d 815, 818 (9th Cir. 1997). Moreover, Espinoza failed to make a “substantial threshold showing” as required by *United States v. Wade*, 504 U.S. 181, 185-87 (1992), that the government acted with an unconstitutional motive, arbitrarily or in bad faith. The government’s reason for not recommending departure, Espinoza’s failure to provide critical testimony at trial, is related to a legitimate government end. *Id.*; *United States v. Burrows*, 36 F.3d 875, 884 (9th Cir. 1994).

AFFIRMED.